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Book Review

HUMAN LAW AND HUMAN JUSTICE. By Julius Stone. Stanford, California: Stanford University Press. 1965. Pp. xxiii, 415. \$10.00.

In 1946 Professor Julius Stone published *The Province and Function of Law*. The author's objective was to examine and critique three broad areas: the analytics of legal reasoning, the dimensions and meaning of justice, and finally, the various endeavors that have been made to use the social sciences within the legal framework so as to achieve justice in a modern democratic society. *The Province and Function of Law* received warm critical acclaim; Roscoe Pound called it "an outstanding contribution to the science of law."¹ However, since then the author has, because of what he considers "the vast proliferation of scholarship in each of the three areas,"² ambitiously undertaken to expand upon his original treatise by publishing separate works covering each area. The first book of the trilogy, *Legal System and Lawyer's Reasoning*, which appeared in 1964, is an extremely readable and scholarly treatment of the classical and contemporary use of reason and logic in developing legal systems. And since there is a definite nexus between the first and second books of the trilogy, it is perhaps advisable to first briefly summarize *Legal System and Lawyer's Reasoning*.

Focusing mainly on John Austin's strict commitment to a legal order in which positive law flows down to the citizens from sovereign commands and is enforced by "sanctions," on Hans Kelsen's classification of hierarchial norms, and concluding with Wesley Newcomb Hohfeld's comparatively less theoretical system of eight basic legal conceptions, Stone developed a discernible thread of intellectual continuity that connected each generation's efforts at constructing logically consistent legal systems. While fully accepting the necessity for endeavors, both by the practitioner and the scholar, to abstract law from the concrete and to use logic as a foundation for definition, he emphasized the fallacy of ignoring the impact of the environment in which the legal system must function. And it is in this particular area of thought that Stone has made a meaningful contribution. Through the use of what he labeled categories of illusory reference, Professor Stone developed a set of principles designed to reconcile the seemingly deterministic and immutable application of *stare decisis* with the dynamics of social, economic, and political changes. Of course the notion of mechanical jurisprudence has been sharply questioned by countless others. But by demonstrating how his categories of reference "serve as devices permitting a secret and even unconscious exer-

1. Pound, Book Review, 61 HARV. L. REV. 724 (1948).

2. STONE, LEGAL SYSTEM AND LAWYER'S REASONING 1 (1964).

cise by courts of what in the ultimate analysis is a creative choice"³ he has added a new and imaginative perspective to prior scholarship. This attitude is, of course, a denial of automatic syllogistic decision-making in favor of a flexible and fertile method that has the capacity to reach equitable solutions within an established framework. Yet any creative and viable legal system must, in the final analysis, depend upon transcending values and external guidelines against which the fairness of the resolution of individual conflicts should be measured. These higher values—which traditionally have been grouped under the word "justice"—constitute the subject matter of the second book of the trilogy.

In *Human Law and Human Justice* Professor Stone readily acknowledges, as of course he must, that the term "justice" is an extremely amorphous concept with endless semantical, philosophical, ethical, etc., twists. It is also a concept that does not engender consensus; as a matter of fact, the search for its meaning has occasionally precipitated warfare. Yet even accepting these conflicts, it is also true that there are established theories of or about justice that, because of their intellectual fiber, generally dominate any thorough discussion on the subject. All of these established theories appear in *Human Law and Human Justice*. The author's technique is to scrutinize and interpret analytically all of the significant concepts of justice in terms of their origins, their influence on their generations, and finally their compatibility with his own notions. The book culminates with Stone's own theories on the meaning and implications of justice.

By beginning his inquiry with an examination of the impact of Western culture on notions of justice (with emphasis on Hebraism and Hellenism) Stone is immediately confronted with the imponderables of natural law. Although its influence has, over a long history of violent conflict, been temporarily diluted with concepts such as utilitarianism (discussed in Chapter 4), pragmatism (discussed in Chapter 9), and other theoretical inroads of varying persuasiveness, it has nevertheless had a virile effect on all efforts to give some definitive form to the notion of justice. There seems to be universal agreement that natural law "sees the individual as held within a framework of binding norms not of human creations."⁴ But beyond this point there is very little harmony of thought. Some of this conflict is due to the abstract quality of natural law. Thus the identical theory of natural law can be used with what Stone calls a "double edged" effect to both support and attack a single system of justice set up under a governing body. An interesting example was the use by the opponents of the Catholic Church of the very same natural law arguments that Thomas Aquinas had advanced to support that institution. This is, of course, only one of the polemics residing in natural law. Stone examines each one—always endeavoring to demonstrate either the theory's appropriateness or its incompatibility with what he considers the realities of justice.

However, Stone is no abstract legal theoretician. Much of the book is spent in discovering and studying the consequences of the merger of seemingly esoteric theories of natural law and justice with the pragmatics of government. This has

3. *Id.* at 241.

4. STONE, *HUMAN LAW AND HUMAN JUSTICE* 31 (1965).

particular relevance to the United States where the drafters of our Declaration of Independence obviously drew from natural law sources in expressing the beliefs that all men are created equal, endowed with certain inalienable rights, such as the right to life, liberty, and the pursuit of happiness. Certainly we, as a nation, have experienced a certain amount of difficulty in translating these ideals into conduct. Perhaps the basic explanation is that it is easier to agree on broad principles than it is to come to agreement on the specifics of actual application. Moreover, as the author points out, there has been anything but accord on other important facets of the problem. Assuming the existence of broad principles, such as the right to the pursuit of happiness, do they apply similarly and equally for all ages and to all citizens and in all circumstances? How are the specifics of these universals revealed to man? For example, the Supreme Court, through the word "liberty" in the fifth and fourteenth amendments' due process clauses, at one time gave natural law status to common law rights such as freedom of contract and the protection of property rights and then proceeded to strike down social and labor legislation that conflicted with these "rights." Yet later, when the mood of the nation changed, these same "rights" receded into the history of overruled decisions, to be replaced by other institutions invoking the same authority as their predecessors.

In investigating the eternal struggle for supremacy between positive and natural law Professor Stone unintentionally illuminates the recent particularist interest of courts in arriving at what might be called "equitable" or "just" results. Actually what seems to be occurring is the adoption of the equity technique of "doing justice," or looking to a higher set of principles against which the litigants conduct must be measured. The natural law influence is obvious. This is confirmed by the fact that English equity accepted the conclusion of natural law proponents that in a confrontation between it and positive law, the latter must fall. The author notes that "Equity showed for centuries a 'magisterial' censorship of a natural law kind, by *ad hoc* alleviation of the rigour and formalism of the common law."⁵ It is thus not surprising to note that the Uniform Commercial Code has absorbed a natural law form of equity by providing that a court may refuse to enforce a contract if it, "as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made"⁶ Hence all positive agreements would be subject to a higher form of justice. Of course, as with all phrases having natural law content, the essential problem lies in giving concrete expression to the word "unconscionable."

This persistent clash between natural and positive law has additional contemporary implications of serious import. Much of the justification advanced by some of the civil rights groups in purposely defying those statutes that they feel are inimical to their cause has been premised upon the existence of transcending moral principles that prevail over and abrogate these statutes. The groups that have embraced this line of thinking have apparently adopted Radbruch's philosophy

5. *Id.* at 77.

6. U.C.C. § 2-302.

that when moral rights are in conflict with unjust positive law "the positive law must give way to justice, not merely in the sense that the positive law is to be regarded as unjust, and not *morally* compelling, but also in the sense that it is not . . . even *legally* compelling."⁷ Such a philosophy is attractive. It would perhaps encourage reaction against tyranny. But it likewise poses formidable problems. For example, what is justice? *Human Law and Human Justice* lucidly discloses that there is no infallible answer to this question. And more pragmatically, who determines which laws are just, and therefore should be obeyed, and which laws are not morally or legally binding?

In the final chapter Professor Stone gives a sense of unity to the book through a scholarly effort to supply a realistic framework within which to deal with the ideal of justice. His concern in ten of the eleven chapters with critiquing the more prominent theories on justice and with the fragile quality of any conclusions on the subject is prefatory to a statement of his own views. Preferring not to confine himself to the permanence of inflexible doctrine and limiting the application of his views to our generation Stone offers nine guidelines or "material precepts of justice which we regard as indubitable for our generation of men and in this sense quasi-absolutes."⁸ Whether one agrees with the content of his "quasi-absolutes," and there is much to recommend them, it is clear that *Human Law and Human Justice* is an important document for everyone concerned with the very delicate balance between the reality of our legal system and man's aspirations.

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7. STONE, HUMAN LAW AND HUMAN JUSTICE 249 (1965).

8. *Id.* at 341.

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